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BEFORE THE
Federal Maritime Commission

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FEDERAL MARITIME COMMISSION

Team Ocean Services, Inc.

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Docket No. 2006-06-08

PETITION FOR A DECLARATORY ORDER

1. SUMMARY OF PETITION BASED ON UNCERTAINTY

Pursuant to the Federal Maritime Commission ("Commission") Rules of Practice and Procedure, 46 C.F.R § 502.68, Team Ocean Services, Inc. ("Petitioner"), a licensed OTI, FMC. NO. 004247NF, respectfully requests that the Commission issue a declaratory order to remove any uncertainty with regard to the lawfulness of agents of OTIs performing non-vessel operating common carrier ("NVOCC") and forwarding services without a license from the Commission. This Petition is limited to matters involving conduct or activity regulated by the Commission under statutes administered by the Commission. Petitioner further asserts that the procedures of this section are being invoked solely for the purpose of obtaining a declaratory ruling which will allow Petitioner and other OTIs to act prospectively without peril upon their own view when engaging agency services from unlicensed persons. Lastly, Petitioner avers that this Petition contains a complete and uncontested factual presentation as to the desired resolution of the uncertainty so that no further discovery or evidentiary hearing is required.

2. STATEMENT OF FACTS

Petitioner, on or about October, 2003, entered into a compromise agreement with the Commission, Bureau of Enforcement which resulted in civil penalties in the amount of \$100,000 on the basis of allegations, among others, that Petitioner violated 46 CFR Part 515 of the Commission regulations “by permitting entities to use its license which were not unincorporated branch offices or bona fide employees of Team Ocean, Inc.” As a result of this compromise agreement, Petitioner immediately changed their operations so that it now operates through one central office, and twenty (20) “unincorporated branch offices”, as that term is defined in the Commission’s Rules and Regulations. OTI services are performed by *bona fide* employees of Petitioner at those locations. Petitioner maintains the appropriate bond amounts on file with the Commission. Team Ocean Services, Inc. is registered to do business in each of the jurisdictions where it has branches. Additionally, Petitioner adheres to all the tax and employment laws of all the jurisdictions where it maintains employees.

3. PROSPECTIVE ACTIVITY

It is the intention of Petitioner, for solely commercial reasons, pending the determination of this Petition, to change its model of operations from branch offices to one which would establish unlicensed agency arrangements with independent unrelated entities. These agreements would permit the agent to hold out, and to provide ocean transportation services as an OTI on behalf of and in the name of Team Ocean Services, Inc., on an exclusive basis, with contractually defined parameters. The OTI activities that would be performed by *bona fide* agents would include, but would not be limited to the following:

- a. Marketing of export and import OTI services exclusively on behalf of Petitioner in defined trade lanes;

- b. Booking of cargo with vessel operating common carriers;
- c. Preparation of shipping documentation;
- d. Issuance of Petitioner's house bills of lading;
- e. On imports, accept cargo transported on Petitioner's housebills for delivery to consignees or other parties;
- f. On export shipments, arrange for delivery of cargo to the piers; and
- g. Any other activity generally performed by OTIs.

Petitioner would enter these agency arrangements by written agreements by which the agency relationship and duties would be clearly defined. Furthermore, the Petitioner would authorize the agents to act on its behalf, subject to its control. Controls over agents would be established by Petitioner with regard to training, supervision, audits, Standard Operating Procedures, and other management tools to ensure best practices, and compliance with federal and other regulations. As part of the agency agreement, the duties of the agent would clearly require it to identify its role as agent for Petitioner to all persons for whom services would be performed. The agent would clearly have to consent to these arrangements in the written agreement to be appointed as agent.

4. **GENERAL COUNSEL OPINION LETTER**

On January 26, 2006, Commission General Counsel, issued an opinion letter ("the Opinion")¹ to two related NVOCCs (collectively, "the Companies"), both licensed OTIs. The Opinion was issued in response to a letter requesting a legal opinion on the question of "whether agents performing non-vessel operating common carrier ('NVOCC') services on behalf of [the Companies] are required to be licensed

¹ The letter is not attached hereto but sufficient description of its contents are contained herein to allow the Commission to identify it with certainty. The letter was not attached since the Opinion was provided to related private parties upon their request to General Counsel. Obviously, the Commission may have the discretion to release this Opinion, upon request, pursuant to applicable law.

by the Federal Maritime Commission (“Commission”) in order to perform those services.” (Opinion, p. 1).

While the Companies “. . . [did] not specifically state the type of ocean transportation services that agents will perform on behalf of [the Companies]. . . , it appears that the entities contracting with [the Companies] to provide NVOCC services will be acting as agents.” Opinion, p. 2. However, The Companies did include a series of conditions that would be imposed on the agents that underscored the control that the Companies would exert on its agents. General Counsel relied on Judah v. Reiner, 744 A.2d 1037 (DC App 2000) to conclude that “[a]n agency relationship exists when one person authorizes another to act on his behalf subject to his control, and the other consents to do so.” The Opinion quoting, from the same case further points out that courts will look both to the terms of any contract that exists and to the actual dealing between the parties to determine whether a principal/agent relationship exists. Opinion, p.2. General Counsel concludes with respect to the request that:

“In this matter it appears that a principal/agent relationship will be established based upon the express authority [the Companies] will give to their agents to provide ocean transportation services on their behalf. Further, the agents will be contractually bound to conduct business on behalf of the principal within parameters set forth by [the Companies] and will remain under the control of the principal, which further demonstrates the creation of a legitimate principal/agent relationship.” Id. at p. 2.

Clearly, the Opinion concludes that it would be lawful for agents of OTIs, to perform OTI services, in particular, non-vessel operating common carrier (“NVOCC”) services without a license from the Commission.

Lastly, General Counsel ends the Opinion by stating: “The foregoing responses are my own, rendered in my capacity as General Counsel and based upon my understanding of your inquiry. Please note that the responses given should not be considered binding upon the Commission should any issues involving your company be brought before the Commission in the future.” Id. at p. 3.

5. **LEGAL SUPPORT FOR PETITION**

The Commission amended and clarified the Rules of Practice and Procedure, Petitions For Declaratory Order, Rule 68 of the Commission's Rules of Practice (46 CFR §502.68, FMC. No. 78-50) by Order served March 7, 1979, FMC No. 78-50. 19 SRR 7 (1979). Among other things, the Commission cited the legislative history of the Administrative Procedure Act² for the principles and circumstances that Congress recognized as appropriate for Declaratory Orders---i.e., when the critical facts could be explicitly stated in the petition, and when such orders would allow persons to act "without peril upon their own view". Id. at p.8. The Commission further stated that declaratory orders were not suited to dispose of contested factual issues, and, therefore, accordingly the declaratory order proceeding would "usually not be necessary to resort to discovery procedures or evidentiary hearing[s]." Id. at p. 8.

This Petition squarely meets all of the above criteria. The facts upon which Petitioner relies as stated and verified herein are explicitly stated and are uncontested. No discovery or evidentiary hearing is required to elicit further facts. The Commission has acknowledged that when Petitioners are seeking advanced rulings from the Commission prior to initiating any activity, it is not unusual at this point that they have only a general description of their intentions, and not specific documentation. *Application of the Loyalty Contract Provisions of the Shipping Act of 1984 To a Proposed Tariff Rule on Refunds*, 23 SRR 1101 (1986). In the above cited case, the Commission stated that a general statement as to the proposed tariff rule was sufficient to meet the requirement, as opposed to providing the actual tariff rule. Petitioner has in the above sections, "Prospective Activity" and "Statement of Facts", provided legally sufficient information upon which the Commission can act in this Petition, including the substance of the intended agency arrangements.

The additional requirement that Petitioner's request be clothed in prospective terms is clearly met in this Petition. The Commission stated that ". . . this Rule is intended to provide guidance to

² Attorney General's Manual on the Administrative Procedure Act, U.S. Department of Justice, 1947, pp. 59, 60.

persons who have not yet acted and who desire a legal ruling on a proposed, future course of action.” *Petition of Evergreen Marine Corporation (Taiwan), Ltd. and Worldlink Logistics, Inc. For Declaratory Order*, 26 SRR 607 (1992). As is evident from the Commission’s files, Petitioner is currently providing OTI services acting with “unincorporated branches”, as that term is defined in the Commission’s regulations, and now prospectively wishes to conduct business for commercial reasons through *bona fide* agents as described in General Counsel’s Opinion Letter dated January 26, 2006. Petitioner meets the “future course of action” requirement.

The final criterion to consider, before the Commission might issue a Declaratory Order, is that such orders would allow persons to act “without peril upon their own view”. There are two supporting facts that address this issue with regard to Petitioner. The most salient one is that the General Counsel Opinion, while addressing Petitioner’s intended actions favorably---i.e., concluding that NVOCC OTI services might be performed by unlicensed *bona fide* agents of the OTI---it also concludes that the opinion is General Counsel’s opinion, and is not binding upon the Commission for matters which may be brought before it in the future. Therefore, this presents abundant peril for those OTI’s, including Petitioner who would wish to act pursuant to the above cited Opinion. In view of Petitioner’s past regulatory history in dealing with agents³ as previously described, the “peril” potentially connected with the prospective activity is real, if the Commission does not support General Counsel’s Opinion in the form of a Declaratory Order.

³ For purposes of this Petition, there is no intent to assert that Petitioner’s prior acts that resulted in penalties would, or would not, have met the agency/principal standard set in the Opinion letter. In that context, that fact is not relevant. However, it is relevant to underscore Petitioner’s motivation to seek a Declaratory Order so that it can prospectively modify its current business model with assurances that it would be acting “without peril upon their own view”. Obviously, Petitioner’s “own view” is now formed by General Counsel’s letter which is not binding on the Commission. Therefore, the need for this Petition.

6. **Conclusion.**

For the foregoing reasons, Petitioner seeks a declaratory order from the Commission specifically affirming that:

- a) It is lawful for OTIs to engage unlicensed persons to act as their agents to perform non-vessel operating common carrier (“NVOCC”) services, as those are defined in the Commissions Rules and Regulations, provided such agency arrangement meets the following requirements:
 - i) that it is based on express authority from the OTI contained in a contract;
 - ii) that the contract clearly binds the agent to conduct business on behalf of the OTI principal within parameters set forth in the contract; and that
 - iii) the arrangement provides that the agent will remain under the control of the OTI principal in performing those activities; and
- b) It is lawful for OTIs to engage unlicensed persons to act as their agents to perform ocean freight forwarding services, as those are defined in the Commissions Rules and Regulations, provided such agency arrangement meets the following requirements:
 - i) that it is based on express authority from the OTI contained in a contract;
 - ii) that the contract clearly binds the agent to conduct business on behalf of the OTI principal within parameters set forth in the contract; and that


iii) the arrangement provides that the agent will remain under the control of the OTI principal I performing those activities.

Respectfully submitted by:

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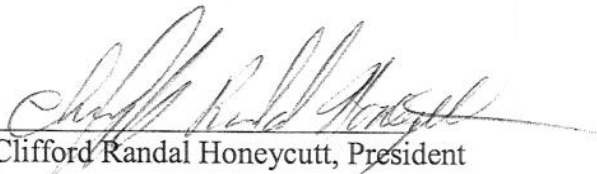
By its Attorneys
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Dated: 8/8/06 Washington D.C.


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VERIFICATION

In accordance with the Federal Maritime Commission's regulations at 46 C.F.R. §502.112(c)(2), I hereby verify and declare that the foregoing statements are true and correct to the best of my personal knowledge and belief under penalty of perjury, pursuant to 28 U.S.C. §1746.



Clifford Randal Honeycutt, President

Team Ocean Services, Inc.

Dated: August 7, 2006